87 - 619
No.

Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

JORGE A. GARCIA
STAFF SERGEANT, UNITED STATES AIR FORCE,
PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

LEO L. SERGI
Colonel, Office of the Judge Advocate General (OTJAG)
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

CHARLES E. AMBROSE, JR.
Major, USAFR
Office of the Judge Advocate General
United States Air Force

53pp

QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT ERRED BY PERMITTING AN EXPERT WITNESS TO TESTIFY IN THE PROSECUTION'S CASE-IN-CHIEF THAT PETITIONER FIT A PSYCHOLOGICAL PROFILE COMMON TO THAT OF CHILD MOLESTERS, WHERE SUCH EVIDENCE WAS NOT OFFERED TO REBUT ANY ISSUE PREVIOUSLY RAISED BY THE DEFENSE?

2. WHETHER ADMISSIONS OF PERJURY BY THE ALLEGED VICTIM, DISCOVERED AFTER PETITIONER'S TRIAL, REQUIRE THAT THE FINDINGS AND SENTENCE BE SET ASIDE AND A NEW TRIAL ORDERED?

3. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	ii
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ	
Question 1	8
Question 2	19
Question 3	20
Conclusion	21

TABLE OF AUTHORITIES

Federal Cases

Chambers v. Mississippi, 410 U.S. 284, 294-295 (1972) 19

Kotteakos v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) 18

Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948) 15

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 7, 20, 21

United States v. Frady, 456 U.S. 152 (1982) .. 19

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed. 2d.1 (1985) 8

Frase v. Henry, 444 F.2d 1228, 1231 (10th Cir. 1971) 10

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 11

United States v. Awkward, 597 F.2d 667, 671 (9th Cir. 1979) *cert. denied*, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979) 11

Page

Federal Cases – Continued

United States v. Barnard, 490 F.2d 909, 912-914 (9th Cir. 1974) *cert. denied*, 416 *U.S.* 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974) 10

United States v. Binder, 789 F.2d 595, 601 (9th Cir. 1985) 10, 18

United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976) *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1122, 51 L.Ed.2d 549 (1976) 10

United States v. Jensen, 608 F.2d 1349, 1356 (10th Cir. 1979) 10

United States v. Marabelles, 724 F.2d 1374, 1381 (9th Cir. 1984) 18

United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981) *cert. denied*, 454 U.S. 1094, 102 S.Ct. 1122, 70 L.Ed.2d (1981) 10

United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977) 18

United States v. Ward, 169 F.2d 460, 462 (3rd Cir. 1948) 10

United States v. August, 21 M.J. 363 (C.M.A. 1986) 7, 8

United States v. Bothwell, 17 M.J. 684, 686 (A.C.M.R. 1983) 11

United States v. DuBay, 17 U.S. C.M.A. 147, 37 C.M.R. 411 (1967) 6

United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986) 8

United States v. Garcia, 23 M.J. 405 (C.M.A. 1987) ..... 8, App A

United States v. Garcia, 22 M.J. 192 (C.M.A. 1986) 7

Page

Federal Cases – Continued

United States v. Garcia, 21 M.J. 153 (C.M.A. 1985) 6
United States v. Garcia, ACM 24238, 5 June 1986 ..... App C
United States v. Garcia, 18 M.J. 716 (1986) .. 7, App B
United States v. Helton, 10 M.J. 820, 824 n.16 at 824 (A.F.C.M.R. 1981) 12
United States v. Moore, 15 M.J. 354 (C.M.A. 1983) 11
United States v. Snipes, 18 M.J. 172 (C.M.A. 1984) 7, 12
United States v. Tomlinson, 20 M.J. 897, 902 (A.C.M.R. 1985) 13
United States v. Wright, 37 C.M.R. 835, n.2 at 840 (A.F.B.R. 1966); affirmed, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967) ... 10

State Cases

Duley v. States, 467 A.2d 776 (MD App 1983) 16
Sanders v. States, 303 S.E.2d 13 (GA 1983) .. 16
States v. Durfee, 322 M.W.2d 778 (Minn 1982) 15
State v. Loebach, 310 N.W.2d 58 (Minn 1981) 14
State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965) 15
States v. Taylor, 663 S.W.2d at 241 13

Constitution and Statutes

United States Const. Amend. 6 20
28 U.S.C. 1259 (3) (Supp. III, 1985) 1
Uniform Code of Military Justice Artice 66, 10 U.S.C. 866 (Supp. III, 1985) 7

Page

Miscellaneous

Fed.R.Crim.P. 52 (b) 19

Manual for Courts-Martial, 1984

Mil.R.Evid. 103(d) 19
Mil.R.Evid. 403 ..... 9, 13
Mil.R.Evid. 404a 7, 13, 14
Mil.R.Evid. 405 9
Mil.R.Evid. 608 20
Mil.R.Evid. 613 20
Mil.R.Evid. 701 9
Mil.R.Evid. 702 9
Mil.R.Evid. 704 ..... 9, 13
Mil.R.Evid. 801 (d)(1)(A) 20

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

JORGE A. GARCIA
STAFF SERGEANT, UNITED STATES AIR FORCE,
PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Jorge A. Garcia, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding on August 18, 1987.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at ____ M.J. ____ (C.M.A. 1986) (Appendix A). The original decision of the United States Air Force Court of Military Review is published at 18 M.J. 716 (A.F.C.M.R. 1984) (Appendix B). A subsequent, unpublished slip opinion of the Air Force Court of Review (upon remand) is appended to this petition (*United States v. Garcia*, ACM 24238, 5 June 1986 – Appendix C).

JURISDICTION

The decision of the United States Court of Military Appeals was rendered on August 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

STATEMENT OF THE CASE

The alleged victim, Jennifer Arlen, age 11, at the time of trial testified that on 18 February 1983, she and her younger brother, accompanied by their mother, visited the Dental Clinic at the USAF Regional Hospital, Eglin AFB, Florida, for routine dental treatment. (R. 40). At approximately 1400 hours, she was taken to a room at the clinic to have her teeth cleaned by the petitioner, SSgt Garcia.

When she entered the room, Jennifer testified that petitioner gave her a wicked laugh and stared at her. (R. 41 and 53). He then had her lie on a dental couch and adjusted it so that her feet were higher than her head. (R. 42.) Petitioner then began cleaning her teeth. At one point during the cleaning, she heard a zipper being unzipped and then observed petitioner place a small towel over his lap. (R. 42.) Jennifer said that petitioner seemed to be nervous, and that he kept shaking. (R. 43.) Towards the end of the cleaning session, while her mouth was full of dental equipment, (R. 51), petitioner moved Jennifer's head towards his lap. Jennifer pulled away and Garcia moved her head back. Petitioner then told her to close her eyes tight, but before she did so, she saw petitioner's penis close to her face moving towards her mouth. Petitioner then "drew back and starting messing in the corner again." When finished, Garcia resumed working on her. During the incident, Jennifer testified, she was scared and unable to move. (R. 43.) When she was called back as a defense witness, Jennifer stated she was sure that she saw petitioner's penis and not his finger. (R. 100.) She knew what a penis looked like because she had seen her nine year old brother's. Petitioner's penis looked like her brother's penis only larger; it was a little lighter than the color of skin. (R. 98.) On cross-examination by the prosecution, Jennifer added that when she saw petitioner's penis, his hand was

not near it. Rather, the penis she saw was protruding from petitioner's fly at the time when his hands were behind her head. (R. 100.)

As a prosecution witness, Jennifer testified petitioner's fingers were not near his pants, and that she was sure he was not wearing a glove or anything on his finger except a ring. (R. 52.)

When she was preparing to leave, petitioner standing, handed her an appointment slip. While she was pretending to read the appointment slip she saw petitioner's pants were unzipped. She stared at the zipper for a few seconds to make sure that she had not imagined the incident. (R. 43.)

After leaving petitioner's room, Jennifer went to her mother. A family friend, another dental technician, Sergeant Kay R. Kauffman, was standing with Jennifer's mother. Sergeant Kauffman testified that at about 1430 hours she saw Jennifer approach looking confused and befuddled. (R. 56, 57.) Jennifer looked back at petitioner's room, then looked at her mother and broke into tears. (R. 57.) Sergeant Kauffman stated she had heard Jennifer mumble to her mother "he kept forcing my head to the right—his zipper was down." (R. 58.)

The prosecution's next witness was a psychologist, Captain Bruce E. Ebert, assigned to the USAF Regional Hospital, Eglin AFB. The court accepted Captain Ebert as an expert witness, qualified in clinical psychology. (R. 59, 60.) During his qualifying examination, Dr. Ebert testified that he had "had extensive additional post-graduate training in the area of sex, sex offenders and rape, and in hypnosis and clinical assessment of sex offenders." (R. 59.)

Captain Ebert testified, without objection by defense counsel, that he had given Sergeant Garcia a battery of psychological tests and had conducted several lengthy diagnostic interviews. Based upon these tests and interviews, Dr. Ebert testified that he was able "to put together

a rather valid and reliable composite of an individual's personality." (R. 60-61), and that petitioner fit the psychological profile of a child molester. (R. 65.)

In discussing the tests which he had given petitioner, Dr. Ebert testifed that petitioner had lied on eleven of thirteen test items, that petitioner had poor impulse control, and that the accused was an individual who was trying to present himself in a favorable light or hide something. He also testified that petitioner had a test score consistent with the type of personality of a person who would use repression and denial as defense mechanisms, that is, who would suppress conscious awareness of unacceptable impulses. (R. 63.)

On cross-examination by the defense, Captain Ebert testified that, while the tests show a capacity to behave in a certain way (R. 66), they do not predict behavior. (R. 65.) He further stated that having the psychological profile of a sex offender does not mean that one will commit a sex offense. (R. 66.) On one occasion, he had tested a self-confessed child molester who showed a normal psychological profile. (R. 67.)

On redirect, however, Dr. Ebert testified that, given his own investigation into the thought processes of the accused, he (Ebert) could not rule out that petitioner had committed the offense charged. (R. 66.)

The defense called several witnesses on behalf of petitioner. The theory of the defense was that Jennifer Arlen was mistaken as to what she saw.

Consistent with this theory, the defense called Sergeant Kauffman and the NCOIC of the dental clinic, MSgt Larry Reid. Both testified that the positioning of Jennifer on the dental couch, SSgt Garcia's movement of Jennifer's head, his use of a lap towel, and his asking his patient to close her eyes tight, were all normal occurrences during a dental cleaning. (R. 75, 76, 92.)

MSgt Reid stated that it was dental clinic policy to keep the door open when working on a patient. (R. 90.) Sgt Kauffman and, through a stipulation of expected testimony, another dental technician, TSgt Jeannette M. Turnage, testified that they had walked by SSgt Garcia's room several times during Jennifer's appointment, had seen petitioner working on Jennifer's teeth, and had not seen anything unusual. (R. 73, 88.)

SrA Lavawne Dehart, who worked for SSgt Garcia, testified that at the time petitioner was working on Jennifer's teeth, she had gone into his room to deliver some paperwork. She saw SSgt Garcia working on a young girl who fit Jennifer's description, and she too had not seen anything unusual. (R. 85.)

The co-workers also testifed there was a lot of traffic in the hallway outside petitioner's room. However, on cross-examination, the prosecution brought out that during the time of Jennifer's appointment, the traffic was lighter than it was earlier in the day (R. 93), and that because of the lap towel and the positioning of the dental couch, people walking by the room probably could not have seen petitioner's lap as he was sitting down. (R. 78.)

Staff Sergeant Garcia testified in his own defense. He denied molesting Jennifer. (R. 108.) He said he did position her on the dental couch, moved her head, used a lap towel and asked her to close her eyes tight as she had described, but these were all normal procedures he used when cleaning teeth. (R. 102, 103.)

During Jennifer's appointment, petitioner said he used a kot, similar to the one pictured in Defense Exhibits E and F, to protect his right index finger. (R. 103; Appendix D to this Petition.) (The inference here being that a finger covered by a kot because of the color and texture could be mistaken for a penis). He admitted it was also true his pants were unzipped (R. 104), but he explained he had gone to the bathroom just before Jennifer's appointment,

and had apparently forgotten to zip up his pants. He did not discover that his pants were unzipped until after he finished cleaning Jennifer's teeth when he stood up and removed the towel from his lap. (R. 110.)

Petitioner was convicted by a court-martial composed of officers (members), and was sentenced to be dishonorably discharged from the service, to be reduced to the grade of airman basic, and to be confined for six years. The Air Force Court of Military Review affirmed petitioner's conviction and sentence on July 13, 1984.

Appellate counsel for petitioner then filed with the Court of Military Appeals a Report of Investigation prepared by the Air Force Office of Special Investigation (AFOSI), which contained an affidavit (Appendix E) from an acquaintenance of the victim, and which indicated that the victim had committed perjury at trial, and had fabricated her allegations against petitioner. The Court of Military Appeals then granted review in petitioner's case on the following issues:

> I. Whether the apellant was denied effective assistance of counsel.
>
> II. Whether the allegation of improper contacts with the court members by the mother of the alleged victim,[1] and the allegation of perjury by the alleged victim, require that the findings and sentence be set aside, or that a hearing pursuant to the *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) be ordered.

In addition, the Court of Military Appeals specified the following issue for review:

> Whether the military judge erred by permitting an expert witness to testify that appellant fit a psychological profile common to child molesters.

United States v. Garcia, 21 M.J. 153 (C.M.A. 1985) (Order Granting Petition for Review). Thereafter, on

---

[1] We do not raise this issue for purposes of this petition.

April 10, 1986, the Court of Military Appeals issued the following order in petitioner's case:

> On further consideration of the granted issues (21 M.J. 153) it appears that issue II raised by appellate defense counsel has not been considered by the United States Air Force Court of Military Review. It further appears that that court should consider the specified issue in light of *United States v. August,* 21 M.J. 363 (C.M.A. 1986), and *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984), and its impact, if any, on granted issue I. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, it is ordered that the decision of the United States Air Force Court of Military Review (18 M.J. 716) is set aside; and that the record of trial is returned to the Judge Advocate General of the Air Force for resubmission to that court for further consideration under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866.

United States v. Garcia, 22 M.J. 192 (C.M.A. 1986).

On June 5, 1986, the Air Force Court of Review again affirmed petitioner's conviction, holding that the "hearsay nature" of the perjury allegations against Jennifer Arlen compelled the conclusion that the second issue granted for review by the Court of Military Appeals was essentially unsupported by any evidence (Appendix 3, slip opinion at 4). The Court of Review concluded that admission of the expert testimony as to petitioner's psychological profile had been erroneous, and that "the only purpose of the testimony was to provide evidence that appellant was more likely than not to have sexually abused the victim," in contravention of Military Rule of Evidence 404(a).[2] The Court then proceeded to hold, however, that:

---

[2] Mil. R. Evid. 404(a) is virtually identical to Federal Rule of Evidence 404(a).

> . . . Because there was no objection interposed by trial defense counsel to any of the testimony in question *no error may be predicted upon the ruling* by the military judge admitting the evidence.

Ibid, slip opinion at 5. The Court of Review then reiterated its earlier holding that trial defense counsel's failure to object to the expert's testimony did not deny petitioner the effective assistance of counsel. *Id.*, slip opinion at 6.

On January 28, 1987, the Court of Military Appeals issued a second grant of review in petitioner's case upon the issue of the admission of the testimony as to petitioner's psychological profile. *United States v. Garcia,* 23 M.J. 405 (C.M.A. 1987). Thereafter, on August 18, 1987, the Court of Military Appeals issued the following order:

> On further consideration of the granted issue (23 M.J. 405), we hold that admission of testimony that appellant's psychological profile was consistent with that of persons who sexually abuse children was error. *See United States v. August,* 21 M.J. 363, 365 (C.M.A. 1986). However, appellant did not object to that action, and we find that action was not plain error. *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Fisher,* 21 M.J. 327, 328 (C.M.A. 1986). Accordingly, it is by the Court, this 18th day of August, 1987,
>
> ORDERED:
>
> That the decision of the United States Air Force Court of Military of Review is affirmed.

REASONS FOR GRANTING THE WRIT
QUESTION ONE

As noted above, during the prosecution's case-in-chief, Captain Ebert, an Air Force clinical psychologist, accepted as an expert witness, testified without objection by

defense counsel that the petitioner had the psychological profile of a child molester, that this profile was consistent with an individual who in his experience had molested children, and that Garcia was therefore capable of committing the alleged offenses. (R. 65.) This was coupled with Ebert's testimony that Garcia had poor impulse control, and that, in his opinion, Garcia had lied about 11 out of a possible 13 test items Ebert had given him. (R.63.)

Presumably, this testimony was offered under Military Rules of Evidence 701, 702, and 704, which allow expert witnesses to express opinion or to draw inferences, *if* such testimony is *otherwise admissible,* even if the testimony embraces an ultimate issue to be decided by the trier of fact. Mil. R. Evid. 704. The purpose of the abrogation of the common-law "ultimate issue" rule by the drafters of Rule 704, however, was *not* to grant carte blanche to prosecutors in the elicitation of expert witness testimony upon all issues.

Military Rule of Evidence 704 was taken verbatim from Federal Rule of Evidence 704. The drafters of the federal rule were careful to specify that:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. *These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach . . .*

Federal Rule of Evidence 704, Advisory Committee's Note, 51 F.R.D. 405 (1971) (emphasis added).

Similarly, the analysis to Military Rule of Evidence 704 provides that the rule "does not permit the witness to testify as to his or her opinion as to the guilt or innocence of the accused, or to state legal opinions." M.C.M., 1984, Appendix 22 at A22-41.

These qualifications on the rule merely reflect a long-standing body of case-law, in effect before the enactment of the Federal Rules of Evidence,[3] but with continued vitality since those rules went into effect. The main thrust of these decisions is that expert testimony should not be permitted if it invades the province of the jury in evaluating the credibility of evidence, whether the effect of such opinions is to bolster or discount other testimony or evidence. *United States v. Binder,* 789 F.2d 595, 602 (9th cir. 1985).[4]

This improper result was accomplished both directly by Dr. Ebert's statements that petitioner had lied on his tests, was acting defensively and was using denial mechanisms (R. 63), and by inference, when Dr. Ebert testified that petitioner fit the profile of a child molester (this indirectly inferred that petitioner was lying when he denied having committed the offenses charged, it also directly inferred that petitioner was the child abuser, and therefore, was guilty as charged). The military judge erred in permitting this testimony to go before the members of the court.[5]

---

[3] *See, e.g., United States v. Ward,* 169 F.2d 460, 462 (3rd Cir. 1948) (an expert may not usurp the exclusive function of the jury in weighing evidence and determining credibility); *United States v. Wright,* 37 C.M.R. 835, n.2 at 840 (A.F.B.R. 1966); *affirmed,* 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967).

[4] *Accord: Frase v. Henry,* 444 F.2d 1228, 1231 (10th Cir. 1971); *United States v. Jensen,* 608 F.2d 1349, 1356 (10th Cir. 1979); *United States v. Samara,* 643 F.2d 701, 705 (10th Cir. 1981), *cert. denied,* 454 U.S. 1094, 102 S.Ct. 1122, 70 L.Ed.2d (1981); *United States v. Brown,* 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied,* 429 U.S. 1100, 97 S.Ct. 1122, 51 L.Ed.2d 549 (1976); Wigmore on Evidence, Third Ed., Vol. VII, § 1920, 1921; 31 Am. Jr. 2d, Expert and Opinion Evidence, § 22.

[5] *See e.g., United States v. Barnard,* 490 F.2d 907, 912-914 (9th Cir. 1974) *cert. denied,* 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974) (trial court properly refused to allow defense to elicit psychiatric

The presumption that members of a jury (or members of the court in a court-martial) are best equipped to determine the ultimate issues of credibility and guilt, without assistance from so-called "experts" in these fields, is based at least in part on the proper reluctance of courts of law to blindly accept the notion that any field of expertise is more capable than a jury in deciding contested issues of fact. In short, lie detectors, either human or mechanical, have not yet been "generally accepted" in the scientific community to the extent that they meet the standard announced in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). Since the relevance of expert testimony is, in part, a function of the underlying scientific principles upon which that expertise rests, if an expert is not truly an expert, his opinion has no legally recognized probative value. *United States v. Bothwell,* 17 M.J. 684, 686 (A.C.M.R. 1983); *see also; United States v. Moore,* 15 M.J. 354 (C.M.A. 1983) at 367-376 (Everett, C.J., dissenting).

In addition to the doubtful validity from a scientific standpoint of lie detector evidence, the inherent prejudice and legal dangers of such evidence have led courts to reject it:

> In determining the ultimate issue of guilt or innocence, it is the function of the fact-finder to hear and assess the witnesses; to weigh that testimony against all other evidence in the case; and to assess its truthfulness in light of human experience and knowledge of the ways of the world . . . presented with conflicting and unreconcilable evidence, the temptation would be great for the courts to defer to

---

testimony as to the credibility of prosecution witness); *accord: United States v. Awkward,* 597 F.2d 667, 671 (9th Cir. 1979), *cert. denied,* 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979).

> the opinion of the polygraph examiners, and abrogate its factfinding responsibility.

United States v. Helton, 10 M.J. 820, 824 n.16 at 824 (A.F.C.M.R. 1981). This sentiment was echoed by Chief Judge Everett of the Court of Military Appeals in his concurring opinion in *United States v. Snipes,* 18 M.J. 172, 180 (C.M.A. 1984):

> In evaluating someone's credibility, "scientific, technical or otherwise specialized knowledge" is of limited assistance to the triers of fact [citation omitted]. Indeed, hearing a purported expert give his opinion about the credibility of a witness may hinder the factfinder by distracting him from using his own experience and common sense, which provide the best means for him to determine the truthfulness of testimony he had heard. Moreover, an anomaly will exist if we continue to exclude the opinions of polygraph operators—who are specially trained and equipped to detect deception—but receive in evidence the opinions of various other "experts" about whether a victim or other witness has been telling the truth.

Similarly, in rejecting expert evidence as to rape trauma syndrome in a closely-contested case, the Army Court of Military Review has held:

> Both the government and the accused are entitled to have issues of fact and credibility decided by court members. To allow an "expert" to offer his opinion on the resolution of a credibility dispute goes too far, and *it makes no difference whether the opinion is expressed or follows inferentially from the expert's diagnosis of a psychological condition suffered by the witness whose credibility is at issue.* The court members must decide whether a witness is telling the truth. Expert insights into human nature are permissible, but lie detector evidence—whether human or

> mechanical—is not. Otherwise, trial could degenerate into a battle of experts expressing opinions on the veracity of various witnesses. *See States v. Taylor,* 663 S.W.2d at 241.

United States V. Tomlinson, 20 M.J. 897, 902 (A.C.M.R. 1985) (emphasis added). In short, to the extent that such evidence has any probative value, it is nevertheless outweighed by the dangers of prejudice to the fact-finding duties of the court, and to an accused. Mil. R. Evid. 403.

The military judge's lack of *sua sponte* action to exclude such evidence was erroneous, for yet another reason, in that such testimony was not "otherwise admissible" (M.R.E. 704) because it violated the provisions of Military Rule of Evidence 404(a). That rule provides in pertinent part:

> (a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion except:
>
> (1) Character of the accused. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.

The testimony of Dr. Ebert was offered by the prosecution during its case-in-chief, not in rebuttal to evidence presented by the defense. It is therefore readily apparent that the character of the accused, either for truthfulness or as a child molester in general, was not in issue at the time Dr. Ebert took the stand. The error in allowing this testimony was recognized by the staff judge advocate to the convening authority below, who advised the convening authority:

> "Under MRE 404, evidence of an accused [sic] character trait (child molester) offered to prove that accused acted in conformity therewith (molested a

> child) is inadmissible unless offered by the defense or by the prosecution to rebut such defense evidence . . . the testimony of a psychologist was offered by the prosecution on direct, [case-in-chief] not in rebuttal . . . so, it is clear that the admission of the evidence was error."

SJA's Recommendation, paragraph 49 at page 16.

In *State v. Loebach,* 310 N.W.2d 58 (Minn. 1981), Loebach was convicted of third-degree murder of his three-month-old son. The state called an expert on child abuse during their case-in-chief to testify on the "battered child syndrome." He concluded Loebach's case fit this model almost perfectly. Over defense objection, the expert was permitted to testify that battering parents tend to have similar personality traits and personal histories. The state also called over defense objection two witnesses from Leobach's past in an attempt to prove he fit the pattern of a "battering parent." Loebach took the stand and denied abusing his son. He did not put his character in evidence.

The Minnesota Supreme Court in construing Minnesota Rule of Evidence 404(a), which is identical to M.R.E. 404(a), found that the evidence presented by the expert on the "battering parent profile" and the testimony of the two witnesses from the appellant's past, should not have been admitted by the trial judge. The court found there were three basic reasons for the exclusion of character evidence to prove that a criminal defendant had acted in conformity with such character:

> First, there is the possibility that the jury will convict a defendant in order to penalize him for his past misdeeds or simply because he is an undesirable person. Second, there is the danger that a jury will overvalue the character evidence in assessing the guilt for the crime charged. Finally, it is unfair to require an accused to be prepared not only to defend against immediate charges, but also disprove or explain his per-

sonality or prior actions. *State v. Spreigl,* 272 Minn. 488, 139 N.W.2d 167 (1965); 2 Louisell & Mueller, Federal Evidence §§ 1136 (1978); I.J. Wigmore, Evidence §§ 193-94 (3d. 1940). Justice Jackson, in *Michelson v. United States,* 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), recognized the nature and extent of the potential evidence. In a widely cited opinion he stated the reasons for exclusion of character evidence as follows:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, . . . but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant: on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience and its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. *Id.* at 475-76, 69 S.Ct. at 218-19 (citation and footnotes omitted.)

Loebach, supra, at 63 and 64.

The rationale of the Minnesota Supreme Court has been followed in a series of other cases dealing with the same kind of expert testimony. *See: States v. Durfee,* 322

M.W.2d 778 (Minn. 1982); *Sanders v. State,* 303 S.E.2d 13 (Ga. 1983); *Duley v. States,* 467 A.2d 776 (Md. App. 1983).

Although none of these convictions were reversed, in all of them the evidence of the appellant's guilt was overwhelming. Unlike the cited cases, the evidence presented in the instant case was hotly contested and was anything but overwhelming for the prosecution. The only witnesses to the alleged incident were Sergeant Garcia and the alleged victim. The prosecution's theory was that the discrepancy was the result of a deliberate lie on the part of Garcia. The defense's position was the discrepancy was the result of an innocent mistake by Jennifer Arlen.

Both witnesses were supported by extrinsic evidence. For the prosecution, this evidence included Jennifer Arlen's emotional, spontaneous reaction, witnessed by her mother and a dental technician, after she left Garcia's dental examination room; Garcia's admission that his zipper was down during the time he worked on Jennifer's teeth; and Garcia's failure to offer a satisfactory explanation when confronted by Jennifer's mother.

For the defense, the supporting extrinsic evidence was that much of what Jennifer testified to (positioning of the dental chair, moving the patient's head towards the technician's lap, telling a patient to close her eyes, and the use of a lap towel), is normal procedure for a dental cleaning. In addition, Sergeant Kauffman testified that Garcia appeared "taken aback" and confused when confronted by Jennifer's mother. This would explain his failure to provide an explanation to Jennifer's mother when confronted by her.

There was also testimony by two lab technicians who walked by Garcia's room on several occasions; one went into the room on one occasion, and neither saw anything

unusual. This supports petitioner's version of what happened. In order for Garcia to have accomplished this offense, he would have had to assume a semi-standing or squatting position. In such a position, he would have been fully exposing himself towards the open door of the examination room. Therefore, given the heavy hall traffic, the open door, and the possibility that co-workers would either look in or enter during a cleaning, it certainly seems unlikely that Garcia would have taken the risk of exposing himself to Jennifer.

With the evidence in this posture it becomes readily apparent that the crucial evidence in this case was that presented by Captain Ebert. The prosecutor at one point in his argument even classified Ebert's testimony as "critical":

> Remember what he said about the accused in his test results? The accused has very poor impulse control. Lewd and lascivious acts on little girls, we submit, are not crimes that are carefully calculated out, planned by the child molester who comes up with the design to prey on a particular time. These offenses are impulse type offenses. There is nothing wrong with the accused's mental condition, except that he can't control his impulses and it is that—the fact that he gives into his impulses—makes him consistent with a person who would do this even though the normal person would not perhaps take a risk that someone would see what he is doing. Doctor Ebert's testimony, we submit, is very helpful in evaluating the accused and the conditions that occurred in the Dental Clinic at that time. You should consider that . . . Let's talk for a moment about Doctor Ebert's testimony. His—he told you a great deal about the mental traits—personality traits of the accused. *His testimony is critical*

> *because he gave you a preview of exactly how the accused was going to perform on the stand. He knew exactly what the accused would be doing in this case with respect to his testimony.* The accused is manipulative. The accused wants to present himself in the best light possible. Indeed he's certainly trying to fix the tests that he took. He tried to answer the questions—fabricate answers to the questions on the testing—tests that were given to him. We submit to you that the testimony of Doctor Ebert gave you a preview of the mental makeup of the accused. And the reasons he's got to testify and testify falsely. Evaluate his testimony with regard to what Doctor Ebert said.

(R. 129, 155, emphasis added.)

Although cross-examination attempted to minimize the damaging effects of Captain Ebert's testimony, the attempt was largely unsuccessful. The impact of direct examination was great and was emphasized in argument by the prosecution. The court members were told by an expert witness with extensive credentials, that Sergeant Garcia was a liar who could not control his impulses and, therefore, molested children.

A trial court's decision as to the admissibility of expert testimony is reversible only where there is manifest error or abuse of discretion. *United States v. Binder,* 769 F.2d 595, 601 (9th Cir. 1985); *United States v. Marabelles,* 724 F.2d 1374, 1381 (9th Cir. 1984). Erroneous admissions of such testimony are reversible, however, if the evidence "more probably than not materially affected the verdict." *Binder, supra,* at 601-602; *United States v. Valle-Valdez,* 554 F.2d 911, 916 (9th Cir. 1977). Where there remains grave doubt as to the effect of the error upon the verdict, the conviction cannot stand. *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Court of Military Appeals' findings below that appellant

was not prejudiced by these errors is untenable and unsupported by the evidence at trial.

As made clear by Military Rule of Evidence 103(d), the absence of an objection does not render moot the review of an error which materially prejudices the substantial rights of the accused. The admission of testimony which was tantamount to a directed finding of guilt based upon the diagnosis of the accused as a guilty, deceptive child molester, proffered by a purported expert in the field, easily fits the definition of plain error as contemplated by the Rule.[1]

QUESTION TWO

Petitioner is entitled to a new trial in which he could confront his alleged victim with her admissions of perjury to Pamela Seiler. The summary dismissal of this issue by the Air Force Court of Review, affirmed without comment by the Court of Military Appeals, has perpetuated the denial to petitioner of a fair trial. It is insufficient support for these decisions to merely cast aside the matter as one of weightless hearsay, as such a ruling, had it been employed at trial would have, in effect, denied petitioner "the right to a fair opportunity to defend against the [Government's] accusations", since "the rights to confront and cross-examine witnesses" are "essential to due process." *Chambers v. Mississippi,* 410 U.S. 284, 294-295 (1972). Petitioner would have been entitled, had he known of Arlen's admissions at the time of trial, to confront her

---

[1] Contrary to the holding of the Air Force Court of Review that "*no* error may be predicated" in the absence of an objection, it is well-established that even absent objection, those errors which seriously affect the fairness of a trial may mandate reversal under the plain error standard of review. *United States v. Young,* 470 U.S. 1 (1985); *United States v. Frady,* 456 U.S. 152 (1982). *See also;* Fed. R. Crim. P. 52(b).

with these prior inconsistent statements, and even to produce extrinsic proof of these admissions. Military Rules of Evidence 608, 613. The egregious nature of the Air Force Court's dismissal of this issue upon grounds of hearsay is illustrated by the fact that, under substantive military and federal evidentiary law, prior inconsistent statements of a witness are *not hearsay*. Mil. R. Evid. 801(d)(1)(A); Fed. R. Evid. 801(d)(1)(A).

QUESTION THREE

In *Strickland v. Washington,* 104 S.Ct. 2052 (1984), this Honorable Court set forth the standards which must be met before an appellant can prevail on a claim of counsel ineffectiveness:

> First, the defendant must show that counsel's performance was deficient . . . that counsel made errors so serious that [she] was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense . . . that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Ibid,. 104 S.Ct. at 2064.

Petitioner has satisfied both of these requirements. There can be little doubt that trial defense counsel's failure to object to the testimony of Dr. Ebert—testimony which amounted to an expert's finding of guilt arrived at through psychological diagnosis—was error, and the product of that counsel's rank inexperience. Trial defense counsel even admitted such was the case in her post-trial affidavit filed with the lower courts (Appendix F).

There can also be no genuine dispute as to the prejudicial impact of this error upon petitioner's trial. The lay members (jurors) of petitioner's court-martial were told by an expert witness with extensive credentials that petitioner was a liar who could not control his impulses and molested children. This "evidence", in an otherwise close and hotly-contested trial, was characterized as critical by the prosecutor in argument. The erroneous admission, without objection, of this testimony "had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland v. Washington, supra,* 104 S.Ct at 2069. Having had his trial fatally infected by this diagnosis of guilt, petitioner received a conviction that remains unreliable, especially when considered alongside his "victim's" admissions of perjury.

CONCLUSION

Petitioner submits that his petition for a writ of certiorari should be granted.

Respectfully Submitted.

LEO L. SERGI
Colonel, Office of the Judge Advocate General (OTJAG)
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

CHARLES E. AMBROSE, JR.
Major, USAFR
Office of the Judge Advocate General
United States Air Force

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 50869/AF
CMR Dkt. No. 24238

UNITED STATES, APPELLEE

v.

JORGE A. GARCIA, (463-02-9196), APPELLANT

ORDER

On further consideration of the granted issue (23 M.J. 405), we hold that testimony that appellant's psychological profile was consistent with that of persons who sexually abuse children was error. *See United States v. August,* 21 M.J. 363, 365 (C.M.A. 1986). However, appellant did not object to that evidence nor do we find the admission of this testimony was plain error. *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Fisher,* 21 M.J. 327, 328 (C.M.A. 1986). Accordingly, it is, by the Court, this 18th day of August, 1987,

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (AMBROSE)
Appellate Government Counsel (GIOVAGNONI)

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24238.

UNITED STATES

v.

STAFF SERGEANT JORGE A. GARCIA,
FR 463-02-9196, UNITED STATES AIR FORCE.

Decided 13 July, 1984.

Accused, a staff sergeant in the United States Air Force, was convicted by general court-martial, Barton L. Spillman, J., of committing lewd and lascivious acts with another, and he appealed. The United States Air Force Court of Military Review, Foray, Senior Judge, held that: (1) accused was not denied effective assistance of counsel, and (2) specifications of two offenses of committing lewd and lascivious acts, alleged to have occurred at the same time and place and with the same victim, were multiplicious for findings purposes.

Affirmed.

1. Military Justice No. 1242

Accused is entitled to reasonably competent counsel who exercises that competence throughout trial in accused's behalf. UCMJ, Art. 27(a, b), 10 U.S.C.A. § 827(a, b).

2. Military Justice No. 1242

In determining whether accused was denied effective assistance of counsel, task of Court of Military Review is to determine whether counsel's assistance was so defective that it deprived accused of fair trial, trial whose result is reliable. UCMJ, Art. 27(a, b), 10 U.S.C.A. § 827(a, b).

3. Military Justice No. 1242

Accused's trial counsel was not ineffective in failing to object to testimony of clinical psychologist during findings portion of trial where any damaging aspects of his testimony given under direct examination had been effectively neutralized by testimony elicited from him upon cross-examination and where court members determined guilt by resolving conflicting evidence between victim and accused without resort to psychologist's testimony.

4. Military Justice No. 1242

Accused's trial counsel was not ineffective in failing to object to cross-examination of accused when questioning allegedly improperly brought before the court evidence of accused's right to remain silent where aim of the cross-examination was directed toward showing that accused's story was of recent fabrication.

5. Military Justice No. 1242

Accused was not denied effective assistance of counsel by counsel's failure to object to psychologist's testimony during sentencing regarding recidivism rate where the testimony and prosecution's comments thereon during sentencing argument tended toward influencing court members to adjudge sentence that would act as deterrent with respect to future similar conduct.

6. Military Justice No. 959

Two charges of committing lewd and lascivious act upon another alleged to have occurred at same time and place and with same victim were multiplicious for findings purposes.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Captain Bruce T. Brown.

Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Major Robert E. Ferencik, Jr.

Before FORAY, SNYDER and O'HAIR, Appellate Military Judges.

DECISION

FORAY, Senior Judge:

Appellant was convicted by a general court-martial of two offenses of committing lewd and lascivious acts with the same female who was under the age of 16 years. The approved sentence extends to dishonorable discharge, confinement at hard labor for six years, and reduction to the grade of airman basic.

Appellant makes claim that two errors were committed during his trial which require remedial action by the Court.

I

The first of the two claims we shall review is:

THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

This assignment of error has multiple aspects which will be discussed *seriatim*.

A

THE TESTIMONY BY CAPTAIN EBERT DURING FINDINGS, VIOLATED MILITARY RULE OF EVIDENCE 404(a) AND ITS ADMISSION WAS PLAIN ERROR.

Captain Ebert, a clinical psychologist, was called and established as an expert witness by the prosecution. He testified that a battery of psychological tests was administered to the accused and that several lengthy interviews were conducted with him. Captain Ebert opined that, as a result, the accused fit the psychological profile of a "child molester" and was capable of committing the offenses charged. He further opined that one of the validity scales include within the pyschological tests performed was very much elevated indicating the accused had a tendency to "present himself in a way that is far beyond what would be expected of him even though that is contrary to his basic nature." Captain Ebert testified without objection from trial defense counsel.

During cross-examination by trial defense counsel, however, Captain Ebert allowed that the tests conducted on the accused merely indicated a capacity to act in a certain way and did not predict his behavior. He stated that a person having a profile of a "sex offender" does not mean that the person will commit a sex offense. He further testified that he had once tested a self-confessed child molester who showed a "normal psychological profile."

B

THE TRIAL COUNSEL VIOLATED M.R.E. 301(f)(3) DURING CROSS-EXAMINATION OF APPELLANT.

The victim of the offenses had testified that before the accused committed the acts alleged she heard the accused's

pants unzip and then saw him place a towel on his lap.[1] She later saw the fly of the accused's trousers to be, in fact, unzipped. The accused, testifying in his own behalf, denied unzipping his trousers in the victim's presence as stated by her, but admitted that his fly was, indeed, unzipped. He stated he first noticed that condition after the victim had departed his presence at which time he remedied the situation.

On cross-examination of the accused the trial counsel sought to show that the accused's explanation as to the innocent and inadvertent "open zipper" was of recent fabrication. Trial counsel elicited testimony from the accused that when confronted with an allegation against him by the victim's mother on the day in question he never offered his explanation as to why his fly had been unzipped. Also elicited from the accused was the testimony now claimed to be violative of M.R.E. 301(f)(3). That was testimony of the accused that he never offered any exculpatory version regarding his "open zipper" to his commander or certain superior noncommissioned officers either. No objection to this line of questioning by trial counsel was offered by defense counsel.

C

CAPTAIN EBERT'S PRESENTENCING TESTIMONY WAS INADMISSIBLE.

Without objection by defense counsel, trial counsel asked Captain Ebert his opinion regarding the general recidivism rate for persons who commit sexual offenses on children. He answered:

> Yes. It's great. It's better than 80 percent without incarceration. It's slightly a little bit less with incarcera-

[1] At the time pertinent hereto the victim was undergoing a dental prophylaxis performed by the accused, a dental technician, in an examination room of the base dental clinic.

tion without a treatment program. In actual prisons where there are somewhat non-formalized treatment programs, it's slightly less than that and for extensive programs, of which there are only a few in the country, it can be very, very low. Essentially what I am saying is that without treatment expect recidivism.

D

TRIAL COUNSEL'S SENTENCING ARGUMENT WAS IMPROPER.

The complained of argument was not met with objection at trial. It emphasized Captain Ebert's testimony cited above regarding recidivism and treatment. Trial counsel asked the court members to consider the fact that if the accused is confined for seven years no child would be molested by him for that period. He also asked the court members to consider "a 75 percent chance that he's going to get out of there very shortly and commit another criminal offense just like this." He further argued that a brief period of confinement would result in subjecting another young girl to suffer through the indignities and humiliation the victim in this case endured if a substantial perior of confinement was not adjudged.

Appellate defense counsel have submitted a Motion for Leave To File Affidavit of Trial Defense Counsel, which we grant. The affiant[2] unabashedly acknowledges failing to object to those matters which constitute the gravamen of this appeal. The reasons advanced for the failure to object were counsel's inexperience and the uncomfortable feeling caused by it. Appellate defense counsel contend trial defense counsel's ineffectiveness during the findings portion of the trial requires reversal of the

[2] The convening order shows trial defense counsel was certified in accordance with U.C.M.J., Article 27(b) and designated by The Judge Advocate General for detail as an Area Defense Counsel, Headquarters, United States Air Force Judiciary.

findings and sentence in the case. Counsel's ineffectiveness during the sentencing portion of the trial, they say, would require a rehearing on the sentence in the case.

[1] The Court of Military Appeals has construed an accused's right to be represented by counsel, as provided for under Article 27(a), U.C.M.J., to mean the right to be represented by an effective counsel. Also, the accused is entitled to a reasonably competent counsel who exercises that competence throughout the trial in the accused's behalf. *United States v. Jefferson,* 13 M.J. 1 (C.M.A.1982); *United States v. Rivas,* 3 M.J. 282 (C.M.A.1977); *United States v. Walker,* 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972). That Court has said, though, the device for measuring the existence or absence of the required degree of counsel's competence in a criminal trial has been ambiguously stated. It is clear, however, that

> [m]ere mistakes and errors in judgment of counsel are insufficient to establish a violation of the defendant's constitutional [or statutory] right to effective assistance of counsel. It is only where the mistakes or errors amount to inadequate or ineffective assistance of counsel that it can be said that the appellant has been denied his constitutional [or statutory] right of assistance of reasonable competent counsel and one rendering reasonably effective assistance.

United States v. Rivas supra; United States v. Hancock; 49 C.M.R. 830 (A.C.M.R.1975).

Recently the United States Supreme Court decided a case which required it to consider the proper standards for judging an assertion by a ciminal defendant that the Constitution requires a conviction or death sentence to be set aside because the ineffective assistance of counsel at the trial or sentencing. *Strickland v. Washington,* ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To require a reversal of a conviction, or death sentence, they said, the

defendant must show that counsel's assistance was defective in two essentials. These are:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

When a conviction is thus challenged, the question is whether there is a reasonable probability that, without the errors, the factfinder would have had a reasonable doubt as to guilt. When the sentence is so challenged, the question is whether there is a reasonable probability that, without the errors, the sentencer would have concluded the sentence should have been less severe. To make this determination, the court deciding a claim of ineffectiveness of counsel must consider the totality of the evidence before the factfinder or sentencer. In this regard the Court in *Strickland* said:

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolate, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with over-

whelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

[2] Our task now will be to determine whether trial defense counsel's assistance was so defective that it deprived the accused of a fair trial, a trial whose result is reliable. Since the alleged ineffective assistance of counsel occurred during both the findings and sentencing portions of the trial we will separately evaluate counsel's performance as to each part. To accomplish our task we will assume, without deciding that counsel did commit error by not objecting to those matters pointed out in this appeal.

[3] We do not find that Captain Ebert's testimony during the findings portion of the trial had any substantial impact upon the outcome of that portion. Any damaging aspects of his testimony given on direct examination had been effectively neutralized by the testimony elicited from him upon cross-examination by trial defense counsel. In our view the court members determined the accused's guilt by resolving the conflicting evidence between the victim and the accused without resort to Captain Ebert's testimony. Our view is supported by the fact that after the court members were instructed by the military judge relative to the findings in the case, the president of the court requested that the members be allowed to review the complete testimony of the victim and the accused. When the judge advised the president of the technical difficulties involved in the "playback" of the requested testimony, the president advanced an alternate method of resolving the court members' request. That method was to allow the members to view the room in the base dental clinic where

the offenses were alleged to have taken place. The request was granted and the viewing accomplished.

[4] We do not find trial counsel's cross-examination of the accused to be such as to improperly bring before the court evidence of the accused's right to remain silent. M.R.E. 301(f)(3). The aim of trial counsel's questioning was directed toward showing the court members that the accused's direct testimony regarding the inadvertant open position of his "fly" was of recent origin and not toward showing the accused exercised his constitutional right to remain silent. The thrust of trial counsel's findings argument in this regard supports our conclusion. *United States v. Reiner*, 15 M.J. 38 (C.M.A.1983); *United States v. Moore*, 1 M.J. 390 (C.M.A.1976).

With regard to the findings portion of the trial we conclude that the trial defense counsel's failure to object in those areas alleged was not so serious an error showing counsel was not functioning as the "counsel" guaranteed the accused by the Sixth Amendment. Nor do we find counsel's errors so serious as to deprive the accused of a fair trial. We are convinced the findings in this case would reasonably likely have not been different had the errors not been made. *Strickland v. Washington; United States v. Jefferson; United States v. Rivas; United States v. Walker, all supra.*

[5] Captain Ebert's testimony during the sentencing part of the trial regarding recidivism was based on his experiences and research concerning that subject. *United States v. Snipes*, 18 M.J. 172 (C.M.A.1984); M.R.E. 702 and 703. His testimony and trial counsel's comments thereon during the sentencing argument tended toward influencing the court members to adjudge a sentence in the case that would act as a deterrent to the accused with respect to future similar misconduct. Deterrence evidence and argument is generally permissible. *United States v. Thompson*, 9 M.J. 166 (C.M.A.1980); *United States v.*

Lania, 9 M.J. 100 (C.M.A.1980). Likewise, trial counsel's argument as to the "indignity, the humiliation" the victim experienced by having to testify at the trial is generally permissible. *United States v. Hammond,* 17 M.J. 218 (C.M.A.1984); *United States v. Marrshall,* 14 M.J. 157 (C.M.A.1982). We find defense counsel's failure to object in this regard did not amount to such defective performances denying the accused a fair trial as to sentencing.[3] *Strickland v. Washington, supra.*

II

Appellant also avers:

THE SPECIFICATIONS ARE MULTIPLICIOUS FOR FINDINGS PURPOSES

[6] The accused has been charged with the offenses of committing a lewd and lascivious act upon the victim by exposing his penis to her, with intent to arouse and gratify his lust, passions, and sexual desires (Specification 1) and assault with intent to commit sodomy on the same victim by placing his penis on her face (Specification 2), in violation U.C.M.J., Article 134. Both offenses were alleged to have occurred at the same time and place. He was found guilty of Specification 1, as charged, and, of Specification 2, by exceptions and substitutions, of committing a lewd and lascivious act upon the victim by placing his penis on her face, with intent to gratify his lust, passions and sexual

[3] The military judge instructed the court members to consider the facts and circumstances surrounding the commission of the offenses, and all matters in extenuation, mitigation, and aggravation, properly before them in determining an appropriate sentence. One of the matters in aggravation before the court was an Article 15, U.C.M.J., record of punishment imposed on the accused for the offense of indecent assault upon a female under the age of 16 years. The offense was alleged to have taken place at the base dental clinic while the accused was in the performance of his duties.

desires. Appellate Government counsel agree with appellant's contention. We, too, agree. By its findings as to Specification 2 the court found the accused guilty of the same criminal offense which was alleged in Specification 1. They are duplicative as a matter of law.[4] *United States v. Baker,* 14 M.J. 361 (C.M.A.1983).

Accordingly, the findings of guilty of Specification 1 of the Charge are set aside and dismissed and the findings of guilty of Specification 2 of the Charge and the sentence are AFFIRMED.

SNYDER and O'HAIR, Judges, concur.

[4] The military judge treated both specifications as multiplicious for sentencing; therefore, the accused suffered no prejudice as to the sentence. *United States v. Allen*, 16 M.J. 395 (C.M.A.1983).

APPENDIX C

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24238 (f rev)

UNITED STATES

v.

STAFF SERGEANT JORGE A. GARCIA, FR 463-02-9196
UNITED STATES AIR FORCE

---

5 JUNE 1986

Sentence adjudged 9 June 1983 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Barton L. Spillman.

Approved sentence: Dishonorable discharge, confinement for six (6) years and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Major Charles E. Ambrose, Jr. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Lieutenant Colonel Robert E. Giovagnoni.

Before

FORAY, MURDOCK and O'HAIR
Appellate Military Judges

DECISION UPON FURTHER REVIEW

FORAY, Senior Judge:

This case is once again before us for review.

On 13 July, 1984, this Court affirmed the appellant's conviction by a general court-martial of one offense of

committing lewd and lascivious acts with a female under the age of sixteen years, in violation of Article 134, U.C.M.J.[1] The Court also affirmed the adjudged and approved sentence which extends to a dishonorable discharge, confinement at hard labor for six years, and reduction to the lowest enlisted grade. *United States v. Garcia,* 18 M.J. 716 (A.F.C.M.R. 1984).

On 19 September 1984, the appellant petitioned the Court of Military Appeals for a grant of review of our decision. That Court granted appellant's petition on 11 October 1985. *United States v. Garcia,* 21 M.J. 153 (C.M.A. 1985). Subsequently, on 10 April 1986, that Court ordered our decision set aside and the record of trial returned to The Judge Advocate General for resubmission to this Court for further consideration under Article 66, U.C.M.J. *United States v. Garcia,* ____ M.J. ____ (C.M.A. 1986). In its order that Court stated:

> On further consideration of the granted issues (21 M.J. 153) it appears that issue II raised by appellate defense counsel has not been considered by the United States Air Force Court of Military Review. It further appears that that court should consider the specified issue in light of *United States v. August,* 21 M.J. 363, (C.M.A. 1986) and *United States v. Snipes,* 18 M.J. 172 (C.M.A. 1984), and its impact, if any, on granted issue I. *See Strickland v. Washington,* 466, U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984).

Issue II raised by appellate defense counsel before the Court of Military Appeals and not previously considered by this Court alleges:

> THE ALLEGATIONS OF IMPROPER CONTACTS WITH THE COURT MEMBERS BY THE MOTHER OF THE ALLEGED VICTIM, AND

---

[1] We set aside and dismissed another offense as being duplicative as a matter of law. *United States v. Baker,* 14 M.J. 361 (C.M.A. 1983).

THE ALLEGATION OF PERJURY BY THE ALLEGED VICTIM, REQUIRE THAT THE FINDINGS AND SENTENCE BE SET ASIDE, OR THAT A REHEARING (SIC) PURSUANT TO *UNITED STATES v. DUBAY*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) BE ORDERED.

The specified issue and issue I are, sequentially:

WHETHER THE MILITARY JUDGE ERRED BY PERMITTING AN EXPERT WITNESS TO TESTIFY THAT APPELLANT FIT A PSYCHOLOGICAL PROFILE COMMON TO THAT OF CHILD MOLESTERS.

WHETHER THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

I

One aspect of the allegation in issue II is that the mother of the victim improperly contacted court members. The basis for this allegation is a post-trial affidavit of a Mrs. S, dated 12 June 1984, submitted to the Court of Military Appeals by appellant to support a Petition For New Trial.[2] The part of the affidavit pertinent to this aspect of the issue is:

> During the trial, SHEILA[3] said she had the upper hand because someone she knew from the bowling alley was on the jury. SHEILA stated that she kept in contact with this person regularly and knew exactly what the jury was thinking at all times. Also SHEILA said that through this person she could maintain the sympathy of the jury.

With regard to these averments of Mrs. S, appellate counsel have submitted affidavits of the victim's mother

---

[2] The Petition For New Trial was denied on 11 October 1985. *United States v. Garcia*, 21 M.J. 155 (C.M.A. 1985).

[3] Shiela is the mother of the victim.

and a Captain S—the court member alluded to by Mrs. S to have been improperly contacted. In her affidavit, the victim's mother denies having any contact with any of the court members during the court-martial of appellant. In his affidavit, Captain S claims he knew the victim and members of the victim's family prior to the court-martial, but contact with them was merely in "passing".[4] Other affidavits and documents submitted with regard to this matter indicate that nothing improper occurred between any of the court members and the mother of the victim.

The second aspect of issue II once again has its *genesis* in the 12 June 1984, affidavit of Mrs. S. Mrs. S stated therein that in the spring of 1983, her eleven year old daughter told her that the victim told her, the daughter, that what she, the victim, said about the incident in the hospital was not all true. According to Mrs. S's daughter, the victim said she made some of it up so her mother would be worried and, if worried, would buy the victim new clothes and she would be allowed to do anything she wanted. An affidavit from the victim has been submitted with regard to this aspect of the issue in which she denies being untruthful at the court-martial. She also claims, "At no time before, during, or after the *Garcia* court-martial did I tell anyone that the things I told about the hospital were not true. What I said in court was the truth."

We must now determine whether the issue presented by appellant in issue II reguires either the findings and sentence to be set aside or that a hearing be ordered pursuant to *United States v. DuBay, supra.* To begin, we note

---

[4] At an Article 39a, U.C.M.J., session held without the other court members present, Captain S voluntarily revealed his knowledge of the victim and family. He further stated that this knowledge would not interfere with his ability to perform as a member of the court-martial.

both aspects of this issue were founded upon hearsay declarations of Mrs. S and not upon any personal knowledge on her part. Also, these hearsay declarations have been contradicted by sworn statements of others who would have had personal knowledge of either of the alleged wrongdoing. Significant, we think, in our determination of what weight, if any, should be given to the averments of Mrs. S is the fact that her revelations were made over one year after the appellant had been tried and convicted even though she stated she was aware of these supposed acts of misconduct prior to and during his trial.[5] Her belated statement, along with its hearsay nature, compel us to conclude it should not be afforded any weight. Accordingly, we find that issue II is not supported by any evidence warranting the setting aside of the findings and sentence in the case or to raise an issue requiring a return of the record of trial to the convening authority for purposes of a *DuBay* hearing. *United States v. DuBay, supra;* M.R.E. 801. *See United States v. Bishop,* 11 M.J. 7 (C.M.A. 1981); *United States v. Bourchier,* 5 U.S.C.M.A. 15, 17 C.M.R. 15 (1954).

II

At appellant's trial Captain Bruce W. Ebert testified as an expert in the field of clinical psychology during the presentation of the prosecution's case-in-chief. He testified that a battery of psychological tests was administered to the appellant and that several lengthy interviews were conducted with him. It was Captain Ebert's opinion, as a result of the testing and interviews, that appellant fit the psychological profile of a "child molester" and was capable of committing the offenses charged.[6] He also

---

[5] Appellant's court-martial took place on 7, 8, and 9 June 1983.

[6] The testing and interviews conducted of appellant was alleged to be "relied upon by people in the psychological and psychiatric community (sic) as indicators of personality traits and that sort of thing."

testified that one of the validity scales contained within the psychological test performed was very elevated indicating the appellant had a tendency to "present himself in a way that is far beyond what would be expected of him even though that is contrary to his basic nature." Neither Captain Ebert's qualifications as an expert witness nor any of his testimony was objected to by trial defense counsel.

Since this testimony was elicited from the expert witness before the appellant testified, it appears the only purpose of the testimony was to provide evidence that appellant was more likely than not to have sexually abused the victim. The admission of the testimony, then, was counter to the rule regarding character evidence. According to M.R.E. 404(a):

> Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of the accused.* Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.

However, because there was no objection interposed by trial defense counsel to any of the testimony in question no error may be predicated upon the ruling by the military judge admitting the evidence. M.R.E. 103(a)(1). *See United States v. August; United States v. Snipes,* both *supra.*

We must now determine whether trial defense counsel's failure to object to the expert's testimony denied appellant the effective assistance of counsel. For the reasons stated in our original decision in the case, we find that he was not. *United States v. Garcia,* 18 M.J. 716 (A.F.C.M.R. 1984) and cases cited therein. *See United States v. DiCupe,* 21 M.J. 440 (C.M.A. 1986).

Accordingly, the findings of guilty, as we had previously modified them, and the sentence are

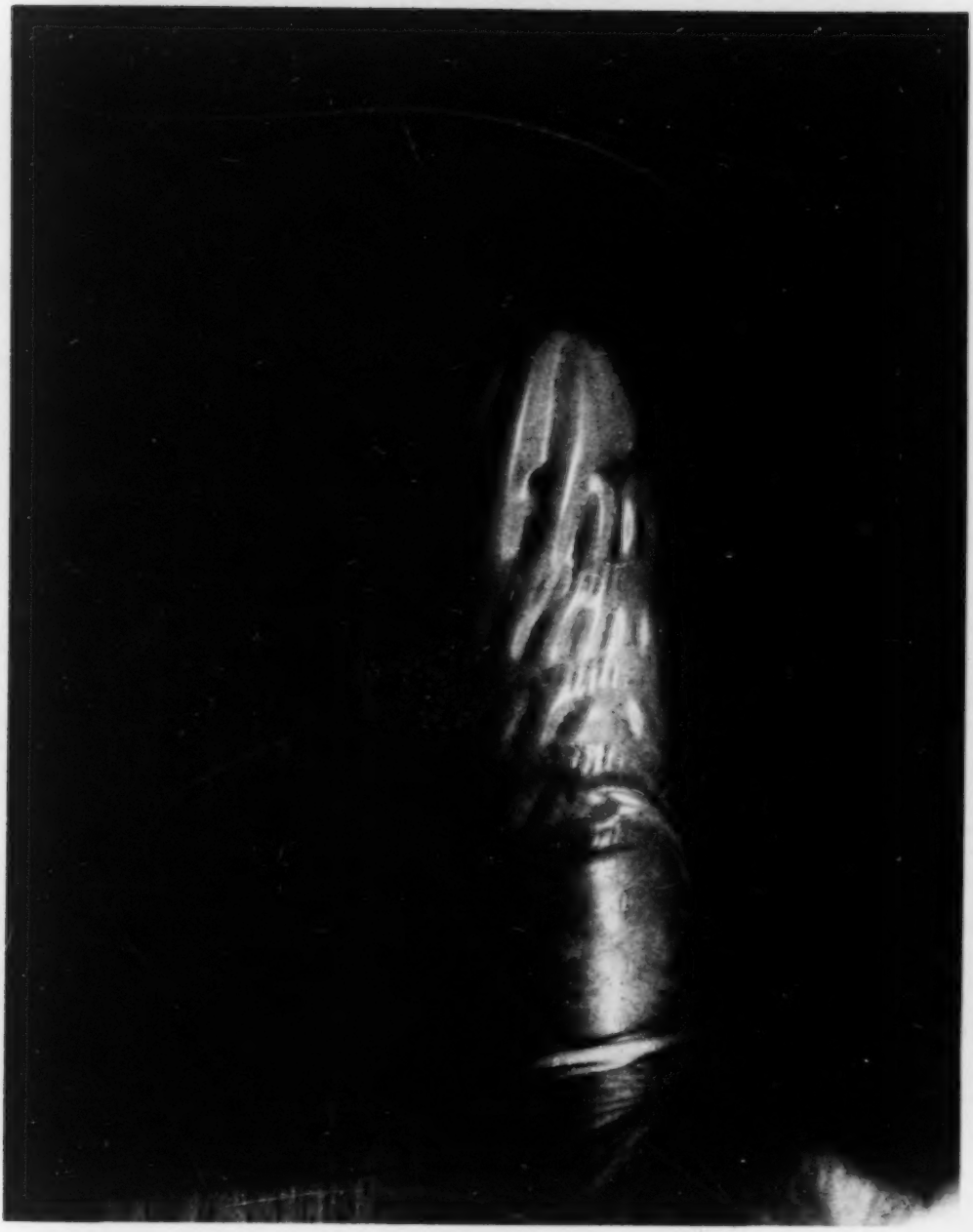
AFFIRMED

Judge MURDOCK and O'HAIR concur.

OFFICIAL

/s/ FELIX LANDAU

Felix Landau
Captain, USAF
Chief Commissioner



DEFENSE EXHIBIT E ~~FOR ID~~

OFFERED PAGE 10

ADMITTED (~~Rejected~~) PAGE: 10

DEFENSE EXHIBIT F ~~FOR ID~~

OFFERED PAGE 10

ADMITTED (~~Rejected~~) PAGE: 10

STATEMENT OF WITNESS

AFOSI Det 710, Eglin AFB, FL
(Place)
12 Jun 84
(Date)

I, JOAN C. SEILER, hereby state that Frances L. Shell has identified himself to me as Special Agent USAF.
(Special Agent AFOSI, Security Police, Other-Specify)

I do hereby voluntarily and of my own free will make the following statement without having been subjected to any coercion, unlawful influence or unlawful inducement. In the spring 1983, prior to the trial date, my daughter, PAM, age 11, told me of a conversation she had with JENNIFER ARLEN. This conversation took place in school at PAM's locker. JENNIE told PAM that the things she told about the hospital incident weren't all true. JENNIE said she made some of it up so her mother would be worried. According to JENNIE, if her mother was worried she would get new clothes and be able to do anything she wanted to. This disturbed PAM. She had known JENNIE to be untruthful before, but she felt this was really serious. At the time, I told PAM not to worry. I assured her that if JENNIE was lying about something this would all come out during the trial.

Also prior to the trial date, sometime in Apr or May 1983 on a Wednesday evening Mrs SHEILA ARLEN and I were baking cookies with the girl scouts at a regular weekly meeting. She asked me to step into the other room for a minute. I did so reluctantly. I felt very uneasy listening to anything about the whole incident. However, I knew if I didn't go into the other room, SHEILA would say something in front of the girls or just call me later. SHEILA then told me that she had just found out that JENNIE didn't have to take a polygraph. According to her JENNIE was now off the hook and had it made.

During the trial, SHEILA said she had the upper hand because someone she knew from the bowling alley was on the jury. SHEILA stated that she kept in contact with this person regularly and knew exactly what the jury was thinking at all times. Also SHEILA said that through this person she could maintain the sympathy of the jury.

Prior to and during the trial SHEILA made frequent reference to the fact that she had friends in "Investigations", "Social Actions", and "OSI". She said she had free access to all information about the sergeant involved. This included a folder of unfavorable information made available to her by a woman working with the OSI. SHEILA claimed she read this folder cover to cover.

Since I worked with SHEILA ARLEN as a co-leader for a girl scout troop last year, I had frequent conversations with her. It is difficult to remember exactly what was said when since this all occurred a year ago. The statements I've made in the above paragraphs are things I remember being said during these specific conversations. At other times I was told of the defendant's Article 15, that the commander of the Dental Clinic was trying to cover it up, and that COL WYCOFF gave SHEILA his full support so they could "nail this individual".

CONTINUATION SHEET FOR AF FORM 1168 and 1169

THIS PAGE FOR SIGNATURE ONLY

JCS

JCS

I further state that I have read this entire statement, initialed all pages and corrections, and signed this statement, and that it is correct and true as written.

WITNESSES:

Louis W Seiler Jr
(Signature)

111-A BIRCH CIR EGLIN AFB FL 32542
(Address)

(Signature)

AFOSI Det 710, Eglin AFB, FL
(Address)

Joan C. Seiler
(Signature)

111-A Birch Cir. Eglin AFB 32542
(Address)

Subscribed and sworn to before me, a person authorized by law to administer oaths, this

12 day of June 19 84

at AFOSI, Det 710

Frances L Shell
(Signature of Person Administering Oath)

FRANCES L. SHELL, Special Agent
(Type Name, Grade & Title of Person Administering Oath)

AF FORM 1170

PAGE 2 OF 2 PAGES

JCS

E-2

AFFADAVIT

COMES NOW THE AFFIANT, AND SAYETH:

I, Patricia L. Larson, swear and affirm that;

I was assigned as the Area Defense Counsel at Hurlburt Field, Florida in March of 1983. In such capacity, I represented SSgt Jorge Garcia in his Court-Martial on charges of committing a lewd and lascivious act and assault with intent to commit sodomy.

During the course of the above mentioned courts-martial, I failed to object to the following testimony and argument;

A) Testimony by Capt (Dr.) Bruce Ebert on findings,

B) Testimony by Capt (Dr.) Bruce Ebert on sentencing regarding recidivism rate of child molesters,

C) Argument by trial counsel concerning the necessity of the victim testifying at the trial and the resultant emotional impact on the victim,

D) Argument by trial counsel concerning rehabilitation of SSgt Garcia.

I did not object to the above matters because I did not recognize or realize that such matters were inadmissable.

At the time I represented SSgt Garcia, I had been certified as a Trial Counsel for approximately three months. I had acted as counsel in approximately six to seven court-martials. One or two of those trials had been litigated.

Recognizing my inexperience and feeling uncomfortable with it, I had requested Circuit Defense assistance in representing SSgt Garcia. I was informed by the Chief Circuit Defense Counsel that no one was available to assist me, as all the Circuit Defense Counsels were unavailable during the time period in question. Thus, I proceeded alone.

I believe that SSgt Garcia had a right to be represented by competent, experienced counsel. Unfortunately for all, I did not provide such representation.

Patricia L. Larson
PATRICIA L. LARSON

Subscribed and sworn to before me this 21st day of March, 1984 at Aviano Air Base, Italy.

Richard Henderson
RICHARD HENDERSON, Capt, USAF
Assistant Staff Judge Advocate
308-84-1355
Tampa, FL

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—194-245/62002

Supreme Court, U.S.
FILED
DEC 18 1987
JOSEPH F. SPANIOL, JR.

No. 87-619

In the Supreme Court of the United States

OCTOBER TERM, 1987

JORGE A. GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF
ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF
JEFFREY H. CURTIS
Capt., OJAG, USAF
MARC VAN NUYS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

BEST AVAILABLE COPY

13 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether it was plain error to admit expert testimony that petitioner fit a psychological profile common to child molesters.

2. Whether petitioner is entitled to a new trial on the basis of hearsay allegations that the victim committed perjury.

3. Whether petitioner was denied the effective assistance of counsel.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Strickland v. *Washington*, 466 U.S. 668 (1984) 9

Statutes and rules:

Uniform Code of Military Justice, 10 U.S.C. (& Supp. IV) 801 *et seq.*:

Art. 15, 10 U.S.C. 815 2

Art. 66(c), 10 U.S.C. 866(c) 8

Art. 134, 10 U.S.C. 934 2

Mil. R. Evid. 801(d)(1)(A) 8

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-619

JORGE A. GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 25 M.J. 159. The initial decision of the Air Force Court of Military Review (Pet. App. 2a-13a) is reported at 18 M.J. 716. A subsequent opinion of the Air Force Court of Military Review on remand (Pet. App. 14a-20a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1987. The petition for a writ of certiorari was filed on October 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial before the military judge at Eglin Air Force Base in Florida, petitioner, a member of the United States Air Force, was convicted on two counts of committing lewd and lascivious acts on a

female under 16 years of age, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to six years' imprisonment, a dishonorable discharge, and ancillary punishments. The convening authority approved the sentence.[1] The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 2a-13a). The Court of Military Appeals granted review (21 M.J. 153 (1985)), vacated the judgment of the Air Force Court of Military Review, and remanded the case to that court (22 M.J. 192 (1986)). On remand, the Air Force Court of Military Review reaffirmed petitioner's conviction (Pet. App. 14a-20a). The Court of Military Appeals affirmed (*id.* at 1a).

1. On February 18, 1983, 11-year old Jennifer Arlen visited the dental clinic at Eglin Air Force Base for routine dental treatment (Tr. 40). At approximately 2 p.m., Jennifer was escorted to a room at the clinic to have her teeth cleaned by petitioner (Tr. 41). Petitioner told Jennifer to sit in the dental chair. He then adjusted the chair so that her feet were higher than her head, and he began to clean her teeth (Tr. 42). Jennifer later heard petitioner's pants unzip (Tr. 42, 50-51) and saw petitioner place a dark cloth on his lap (Tr. 42). Jennifer noticed that petitioner was quiet, but nervous and shaking (Tr. 43). Petitioner then told Jennifer to shut her eyes tightly, and he moved her head toward his lap. She tried to pull away, but petitioner moved her head back so that she could not move. He then told her to shut her eyes tightly. Just before she did, Jennifer Arlen saw petitioner move his penis

---

[1] Petitioner had previously been punished for a similar offense the year before at a proceeding under Article 15 of the UCMJ, 10 U.S.C. 815 (PX 2, Tr. 164). That incident also occurred while petitioner was acting as a dental technician (PX 2).

towards her mouth (Tr. 43, 45, 50). A few seconds later, Jennifer felt it touch the side of her mouth before petitioner moved away. Petitioner then started "messing" in the corner (Tr. 43). Although Jennifer Arlen was afraid during the incident, she was unable to scream because she had dental equipment in her mouth (Tr. 43, 51). When Jennifer was preparing to leave, petitioner handed her an appointment slip. Jenifer pretended to read the appointment slip and saw that petitioner's pants were unzipped. She stared for a few seconds to make sure that she had not imagined the incident (Tr. 43).[2]

After leaving the room, Jennifer returned to her mother, who was waiting outside. A family friend who was also a dental technician, Sergeant Kay Kauffman, was standing with Jennifer's mother (Tr. 56). According to Sergeant Kauffman, Jennifer looked confused and scared (Tr. 56, 57). Jennifer looked back at petitioner's treatment room for three or four seconds, then looked at her mother and broke into tears (Tr. 57). According to Sergeant Kauffman, Jennifer mumbled to her mother that "[petitioner] kept forcing my head to the right and that his zipper was down" (Tr. 58).

2. The prosecution called a psychologist, Captain Bruce Ebert, to testify at trial. The trial court accepted Captain Ebert as an expert witness qualified in clinical psychology (Tr. 59, 60). Captain Ebert testified that he had administered a battery of psychological tests to petitioner and had also conducted several lengthy diagnostic

---

[2] When recalled as a defense witness, Jennifer Arlen testified that she knew what a penis looked like and that she was positive that she saw petitioner's penis and not his finger (Tr. 99-100). On cross-examination by the prosecution, Jennifer added that when she saw petitioner's penis, it was protruding from his fly and his hands were behind her head (Tr. 100). As a prosecution witness, Jennifer had testified that petitioner's fingers were not near his penis, and that she was sure he was not wearing a glove or anything on his finger except a ring (Tr. 52).

interviews (Tr. 60-61a). Based upon those tests, Dr. Ebert gave an opinion as to how petitioner viewed himself and how he related to adult women (Tr. 62). He also gave an opinion that individuals who have some question about their own virility and feel that adult women are unapproachable in some way turn to children to express their sexual impulses (Tr. 62). In addition, Dr. Ebert testified that petitioner was trying to present himself in a favorable light (Tr. 63) and that petitioner had a test score on one scale that was consistent with a personality type that tends to be extremely defensive. He explained that persons with that personality type tend to rely on repression and denial as defense mechanisms, *i.e.*, they try to suppress conscious awareness of unacceptable impulses (Tr. 63). Based upon the tests and his interview with petitioner, Dr. Ebert concluded that petitioner's profile was fairly consistent with the profiles of individuals who in his experience molested children (Tr. 65).

The defense did not object to Dr. Ebert's testimony. On cross-examination, Dr. Ebert conceded that: (1) a person could take the same battery of tests as petitioner and fit within the profile of a sex offender, but never commit a sexual offense (Tr. 65); (2) the tests that he administered can prove absolutely nothing in terms of predicting a person's behavior, *i.e.*, whether he committed a certain act (Tr. 65); (3) the tests are not used for prediction in any manner, and are used only in research studies (Tr. 66); and (4) from the tests, Dr. Ebert could only descibe what is consistent and what is correlated, and could not describe a causal relationship (Tr. 66). Dr. Ebert further stated that having a psychological profile of a sex offender does not mean that a person will commit a sex offense (Tr. 66). In fact, Dr. Ebert testified that on one occasion he had administered tests to a self-confessed child molester, and the subject showed a normal psychological profile (Tr. 67).

On redirect examination, Dr. Ebert testified that, given his own investigation into petitioner's thought processes, he could not rule out the possibility that petitioner had committed the charged offense (Tr. 66). On further cross-examination, however, Dr. Ebert conceded that it is possible that his views on petitioner's personality test results were colored by his prior knowledge of the allegations in this case (Tr. 67). Dr. Ebert also acknowledged that he could never completely rule out the possibility that a person had committed a sex offense (Tr. 66-67).

The defense called several witnesses on petitioner's behalf to support the theory that Jennifer was mistaken as to what she saw.[3] Petitioner also testified in his own

---

[3] Sergeant Kauffman was recalled as a defense witness and testified that she saw Jennifer in petitioner's chair at the time in question (Tr. 73). As a technician, she said she had on occasion moved a patient's head closer to her body and had also instructed patients to close their eyes when she was cleaning their teeth, that it was normal for petitioner to use a lap towel, and that petitioner would wear gloves when he cleaned the teeth of certain patients (Tr. 75). The defense also called Sergeant Reid, who testified that petitioner's movement of Jennifer's head, his use of a lap towel, gloves or a finger kot, and his request to a patient to shut her eyes tightly were all normal occurrences during a dental cleaning (Tr. 92). Sergeant Reid also said that the treatment room doors were usually left open while dental technicians were working (Tr. 95-96). Lavawne Dehart testified that between 2 p.m. and 2:30 p.m. on the day in question she went into petitioner's treatment room for a few seconds to deliver some paperwork and saw petitioner working on a female patient with brown hair (Tr. 84-85). She did not see petitioner's towel or the color of the patient's dress (Tr. 87), and she generally did not see anything out of the ordinary at any time while she was there (Tr. 85). A stipulation of expected testimony established that another dental technican, Sergeant Jeannette Turnage, glanced into petitioner's room at approximately 2:30 p.m. during Jennifer's appointment and saw nothing unusual (Tr. 88-89).

The co-workers also testified that there was a lot of traffic in the hallway outside of petitioner's room. On cross-examination of Sergeant Reid, the prosecution brought out that due to the appointment schedules, the traffic would be heavier on the quarter and half

defense and denied molesting Jennifer (Tr. 105). He testified that he normally used a lap towel during examinations and that he did so during Jennifer's examination, that he did ask her to close her eyes, that his door was open while he was examining Jennifer, and that he moved Jennifer's head toward his body to get access to her mouth (Tr. 102). He testified that these were normal procedures that he followed when cleaning teeth (Tr. 102). Petitioner said that he used a finger kot during Jennifer's appointment (Tr. 103; see Pet. App. 22a). Petitioner admitted that his pants were unzipped while Jennifer was in the room (Tr. 104). He explained, however, that he had gone to the bathroom just before her appointment, that he neglected to zip his pants afterwards, and that he did not discover that his pants were unzipped until he stood up and removed the towel from his lap after cleaning Jennifer's teeth (Tr. 110-111). On cross-examination, the prosecutor pointed out that petitioner did not offer that explanation when confronted by Mrs. Arlen on the day of the incident or to anyone else that day (Tr. 112, 113).

ARGUMENT

1. Petitioner argues (Pet. 8-19) that the trial court erred by allowing Dr. Ebert to give his opinion that petitioner fit the psychological profile of a child molester. The Court of Military Appeals agreed with petitioner on that point, ruling that Dr. Ebert should not have been permitted to state that conclusion (Pet. App. 1a). The court noted, however, that petitioner did not object to the testimony, and it held that the admission of that testimony did not amount to plain error (*ibid.*). For that reason, the propriety of the admission of Dr. Ebert's conclusion—to

---

hour, as opposed to any other time in that corridor (Tr. 93). Additionally, because of the lap towel and the positioning of the dental couch, Sergeant Kauffman testified that she could not tell if petitioner's pants were unzipped (Tr. 78).

which petitioner devotes most of his petition (Pet. 8-18)—is not at issue here. Instead, the only issue presented by the admission of Dr. Ebert's testimony is whether the error in admitting his conclusion that petitioner fit the profile of a child molester is cognizable in spite of petitioner's failure to object at trial. That issue does not warrant review by this Court.

The court of military review correctly held that the admission of Dr. Ebert's conclusion did not have a substantial impact on the outcome of the case (Pet. App. 10a). As the court explained (*ibid.*), petitioner neutralized the damaging effect of Dr. Ebert's testimony on cross-examination. Dr. Ebert conceded that he could not conclude whether petitioner had committed the charged offense, and he conceded that the tests he had given petitioner did not predict or indicate the presence of aberrant sexual behavior. Moreover, although the prosecutor did refer to other aspects of Dr. Ebert's testimony during his closing argument, the prosecutor did not refer to the conclusion that petitioner challenges (Tr. 125-130, 143-147). Because Dr. Ebert's conclusion had little, if any, effect on the outcome of the case, the admission of that evidence did not result in a miscarriage of justice and thus was not cognizable as plain error.

2. Petitioner also claims (Pet. 19-20) that the military courts erred in denying his motion for a new trial on the basis of an affidavit alleging that Jennifer Arlen had stated that she had lied about the incident.[4] As the court of military review explained (Pet. App. 16a-18a), approximately a year after the trial petitioner submitted an affidavit prepared by Joan Seiler, who knew both Jennifer and Jennifer's mother. In the affidavit, Seiler stated that she had been told by her daughter that Jennifer had said that she had lied about the incident (*id.* at 23a). Jennifer

---

[4] That claim was discussed by the court of military review on remand from the Court of Military Appeals (Pet. App. 16a-18a).

submitted an affidavit in response in which she said that she had told the truth at trial (*id.* at 17a).[5] The court of military review denied petitioner's motion for a new trial on the ground that Seiler's allegations were hearsay, that the allegations were contradicted by the sworn statement of Jennifer Arlen, and that Seiler made her allegations more than a year after the trial, even though Seiler was aware of the supposed misconduct prior to and during the trial (*id.* at 18a).[6]

Petitioner argues that the court of military review erred in ruling that the allegations were hearsay, but that argument lacks merit. Seiler's affidavit reported statements purportedly made by Jennifer Arlen to Seiler's daughter who, in turn, relayed the statements to Seiler. The evidence was therefore clearly hearsay—indeed, the affidavit's version of what Seiler's daughter said Jennifer Arlen said is triple hearsay. Petitioner's claim that Seiler's allegations were not hearsay since they were prior inconsistent statements by Jennifer Arlen and were admissible under Mil. R. Evid. 801(d)(1)(A) is mistaken. Under the rule, a prior inconsistent statement is nonhearsay only if it was

---

[5] Seiler also alleged that Jennifer Arlen's mother has also said that she knew and was in contact with a member of the court-martial panel, that Mrs. Arlen knew what the panel was thinking, and that Mrs. Arlen could maintain the panel's sympathy through this person (Pet. App. 16a, 23a). In response, Mrs. Arlen and the court member alluded to by Seiler filed affidavits in which they denied any misconduct (*id.* at 16a-17a). After reviewing all the evidence on this issue, the court of military review found that the evidence indicated that nothing improper had occurred between any of the court members and Mrs. Arlen (*id.* at 17a). Petitioner does not challenge that conclusion in this Court.

[6] The Court of Military Review has the authority under Article 66(c), UCMJ, 10 U.S.C. 866(c), in considering the evidence to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

made under oath in a prior judicial hearing or at a deposition, and the statements of Jennifer Arlen and Seiler's daughter were not made in such proceedings. In these circumstances, the court of military review properly held that petitioner's claim lacked a sufficient factual basis to justify further proceedings.

3. Petitioner also contends (Pet. 20-21) that he was denied the effective assistance of counsel because his attorney did not object to Dr. Ebert's testimony. As he presents it, that claim is not materially different from petitioner's claim that the admission of Dr. Ebert's testimony was plain error. Thus, even if defense counsel erred by failing to object to Dr. Ebert's testimony on direct examination, the error does not entitle petitioner to a new trial, because petitioner was able to neutralize any adverse impact of Dr. Ebert's testimony on cross-examination, as the court of military review found. See *Strickland* v. *Washington*, 466 U.S. 668 (1984) (requiring the defendant to establish prejudice before he is entitled to a new trial).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

JEFFREY H. CURTIS
Capt., OJAG, USAF

MARC VAN NUYS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate
Counsel Division

DECEMBER 1987

☆ US GOVERNMENT PRINTING OFFICE 1987—202-037/60176